

The Petitioner is requesting that the trial courts be required to issue a warning to the litigant regarding the risks and disadvantages of self-representation in complex civil cases similar to the forewarning given to a criminal defendant and civil litigant in complex federal civil cases. Without such a warning, the proper standard of review under California Civil Procedure § 473 is the reasonable lay-person. Petitioner raised this issue on appeal, contending that the proper standard of review under CCP § 473 was a reasonable lay person. Petitioner was not given a warning regarding the dangers of self-representation in a complex case and thus, was unaware that the case was, in fact, complex. Further, Petitioner is self-represented, and lacks any legal training. This case is complex in that it involves parties from several counties and multiple legal claims and requires exceptional judicial management.

Petitioner is also requesting that the Court interprets California Civil Code § 2966 to require actual receipt by a trustor of notice a balloon payment, which is most consistent with the legislative intent. And Petitioner desires that the Court does not apply the alleged judicial admission made in a separate but related case to the Rie v. Rosen case because to a layman this was not in fact a judicial admission that he received Exhibit H or the Notice of balloon payment in January of 1999.

VIII. STATUTORY AND CASE LAW BACKGROUND

Before a criminal defendant may represent himself at trial, he must knowingly and intelligently waive his right to counsel.⁸ In order to competently and intelligently choose self-representation, "defendant should be made aware of the dangers and disadvantages of self representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."⁹ The test of a valid waiver of counsel is not whether specific warnings or advisements were given, but

⁸ Faretta, 422 U.S. 806, (1975).

⁹ *Id.*, at 835.

whether the record, as a whole, demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of a particular case.¹⁰ Many district courts require judges to ask the defendant a series of questions drawn from the model inquiry set for the in the Bench Book for United States District Judges. After the questioning, the district court should make an express finding on the record that the accused has knowingly and voluntarily waived his right to counsel.¹¹ Thus, the burden is placed on the court to apprise the defendant of the dangers of self-representation before a waiver of the right to counsel is effective.

While there is no right to counsel in civil matters, several statutes allow appointment of counsel in a civil matter. Title 28 U.S.C. § 1915(d) empowers the Court to appoint counsel in civil actions brought in *forma pauperis*. Appointment of counsel is discretionary and requires an evaluation of both the likelihood of success on the merits and the ability of the plaintiff to articulate his claims *pro se* in light of the complexity of the legal issues involved. Counsel can also be appointed in other civil cases, such as cases brought pursuant to 28 U.S.C.S. § 2255. Again, the complexity of the case is one of the determining factors in whether counsel should be appointed. In such complex cases, the court has found that the denial of counsel would likely result in fundamental unfairness.¹²

Further, a civil case may be designated as "complex" and thus require judicial management. California Rules of Court §1800, defines a "complex case" as "an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." In determining whether the case is complex, the Court considers, among other things, whether the action is likely to involve:

¹⁰ People v. Bloom 48 C.3d 1194, 1225, 259, C.R. 669, 774 P.2d 698 (1989).

¹¹ See e.g., United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987).

¹² Barnhill, 958 F.2d 200, 202 (7th Circuit 1992).

1. Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
2. Management of a large number of witnesses or a substantial amount of documentary evidence;
3. Management of a large number of separately represented parties;
4. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
5. Substantial post-judgment supervision.

The California Government Code section 68607 reflects the same concern for the manner in which complex case should be handled. It provides that "in accordance with this article and consistent with statute, judges shall have the responsibility to... actively manage the processing of litigation." However, in California, unlike criminal cases and federal complex civil cases, there is no statute or case law to suggest to court is required to apprise the plaintiff of the dangers of self representation despite the complexity of the case.

IX. ARGUMENT

A. STATUTE AND CASE LAW SUPPORT THE PROPOSITION THAT THE COURT WARN LITIGANTS IN COMPLEX CIVIL TRIALS ABOUT THE DANGERS OF SELF-REPRESENTATION.

In criminal trials, a defendant is constitutionally entitled to counsel. If a defendant chooses to represent himself or herself, the Court must adequately warn of the dangers and disadvantages of self-representation. The Court must affirmatively show that the record, as a whole, demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of a particular case. This requirement reflects the concern that self-representation is most often not the desirable option and can often lead the defendant to act in ways detrimental to his or her defense. In addition, the state is always represented by a skilled attorney who has the knowledge and expertise that

the defendant likely lacks. This requirement also reflects concern for the risk and losses that the defendant faces, which is often imprisonment and/or monetary fines.

As stated in Part VII, statute and case law gives the court discretion to appoint counsel in complex federal civil cases where a denial of counsel would, in effect, reduce the proceeding to an ex parte proceeding.¹³ Petitioner is asking that the less burdensome of the two rights given to criminal defendants be afforded to litigants in complex civil matters: that a warning be given before a litigant appears in pro per in a complex civil matter.

The designation of certain civil case as complex, and thus requiring judicial management, further illustrates the need for particular caution in such matters. In allowing such judicial management, the Court recognizes the dangers involved in complex litigation even for experienced attorneys. In pro per litigants should at the very least be aware of how the Courts view such litigation and why self-representation carries inherent dangers. Here, Petitioner was unaware that this case is considered complex and required particular expertise and training. As a result, Petitioner made fatal mistakes.

B. POLICY SUPPORTS THE NECESSITY OF SUCH A WARNING.

It is well recognized that all courts have inherent supervisory and administrative powers which enable them to carry out their duties, and which exist apart from any statutory authority. Federal courts have long recognized that active and effective judicial management of litigation is critical. One federal court has explained that managerial power is not merely desirable, it is necessary.¹⁴ Judges are permitted, therefore, to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the

¹³ Dillon v United States, 307 F.2d 445, 453 (1962).

¹⁴ First State Insurance v. The Superior Court of Los Angeles County, 79 Cal. App. 4th 342, 94 Cal. Rptr. 2d., 104 (2000).

exclusion of other litigants.¹⁵ As improvements in technology lead to increasingly complex litigation, the need for the supervision of the court has increased. The courts are also concerned with overbroad litigation. The system cannot tolerate lawsuits by prospective plaintiffs who sue multiple defendants on speculation.¹⁶

A warning regarding the dangers of self representation will mitigate costs, expedite litigation, and promote effective decision-making by the court, the parties, and counsel. Such a warning allows litigants to consider whether the complexity of the case requires the guidance of counsel. In turn, such cases will necessitate less judicial management because both parties are represented by counsel. This warning, unlike the appointment of counsel, cost only a few moments of time but saves the court's time and the litigants from potentially making costly mistakes. Litigants in complex civil cases often risk facing heavy fines and other financial burdens as result of the litigation. Thus, the reasoning behind the warnings given to criminal defendant applies to litigant in complex civil matters as well.

C. WITHOUT SUCH A WARNING, THE RIGHT TO A FAIR TRIAL AND EQUAL PROTECTION UNDER THE CONSTITUTION IS DENIED.

The court has recognized that in complex civil cases the court might need to appoint counsel.¹⁷ In such cases, the court has further recognized that the denial of counsel could result in fundamental unfairness.¹⁸ Although there is no right to counsel in civil cases, factual issues can be so complex in civil cases that the denial of counsel would reduce the hearings to an ex parte

¹⁵ *Id.*

¹⁶ *Bockrath v. Aldrich Chem. Co.*, 21 Cal. 4th 71, 81, 86 Cal. Rptr. 2d 846, 980 P.2d 398 (1999).

¹⁷ See *Boodie v. Connecticut* 401 U.S. 371, 28 L.Ed. 2d 113, 91 S. Ct. 780 (1971). *M.L.B. v. S.L.J.*, 519 U.S. 102; 117 S. Ct. 555; 136 L. Ed. 2d 473.

¹⁸ See *DesRosers*, 949 F.2d 15, 24 (1st Cir, 1991); *Barnill*, 958 F.2d 200, 2002 (7th Cir 1992).

proceeding.¹⁹ Petitioner does not contend that the court should have appointed a counsel in his case despite its complexity, but rather holds that the court should have apprised Petitioner of the disadvantages of self-representation in this complex matter at the outset of the trial. Such a warning would have put Petitioner on notice of the risks of proceeding in pro per. As a result, Petitioner made grave errors that impacted the outcome of his suit. Due to the complex nature of the suit both factually and procedurally, the lack of such a warning affected the Petitioner's right to a fair trial.

Further, the lack of such a warning requirement violates the Equal Protection Clause of the United States Constitution. Because prison inmates are provided a warning regarding the risks of self-representation and possibly appointed counsel in complex civil matter, it follows that all litigants are entitled to this warning, as the risks are just as great in these complex civil matters. Here, the Petitioner was denied his right to a fair trial and equal protection because he was never advised of the risks of self-representation, he lacked to proper training to determine the complex nature of the case on his own, and consequently conducted the case to his detriment.

D. BECAUSE THE COURT FAILED TO GIVE SUCH A WARNING, THE PROPER STANDARD OF REVIEW UNDER CPP § 473 WAS A REASONABLE LAY-PERSON.

Once a warning regarding the risks of self representation is given, a litigant in a complex civil case is put on notice that he or she proceeds at his or her own risk. However, without such a warning the litigant, due to inexperience, is often unaware of the dangers of self-representation in complex cases. The requirement of such a warning is simply an extension of the need for judicial management in complex case already practiced by the court. In cases where such a warning is not given, as is the case here, the proper standard of review under California Code of Civil Procedure § 473 is the reasonable lay-person.

¹⁹ Dillon, 307 F.2d 445 (1962).

E. BECAUSE THE COURT FAILED TO GIVE SUCH A WARNING PETITIONER ACTED IN DETRIMENT TO HIS CASE, AND SUCH ERRORS SHOULD BE EXCUSED.

In his appeal, Petitioner refers to the fact that the Petitioner is “a layman without such legal experiences and whose major was economics but not law and whose native language was not English.”²⁰ Petitioner is admitting to the fact he lacks the requisite legal knowledge. As a result, he made several fatal mistakes which should be excused by the Court. Specifically, Petitioner’s case would have been likely supported by further discovery and evidence through admissions or interrogatories or depositions against Galperin to bolster his claim, but he lost the chance of any discovery.²¹ And later Appellate Judges abused Exhibit H dated January 7, 1999 submitted by Galperin without the cover letter dated April 14, 1999 to conclude that Rie received Exhibit H (Section 2966 Notice) on January 7, 1999 not on April 14, 1999 while ignoring Rie’s Document completely, even though they could evaluate Rie’s credibility through it.²²

Another loss of Petitioner is that the breach of agreement claim was also denied for the reason of “stricken sua sponte”, since the lay-person added this claim in FAC without permission of the court whereas it was not included in the original complaint. While breaching the agreement to add Rosen and his law offices as Defendants, Galperin resigned from the retained attorney, and

²⁰ Rie v. Rosen Appellate brief, p7.

²¹ At that time in 2003, Petitioner misunderstood the laws regarding discovery process such that the discovery process including deposition could not be started until the demurrer was overruled. Nobody including the trial judge (though it may not be the duty of judge for layman in pro per) advised him that he had the right to have the discovery including request for admissions or interrogatories or depositions against Galperin even before the hearing of demurrer. Later, at the time of requesting the admission from Galperin in February of 2005, he had realized his right. If the discovery had been performed at that time, based on that discovery, Petitioner would have had no trouble to have a really fantastic Rosen Case. Still, he will be able to have the fantastic Rosen Case, if he performs the discovery process against Galperin after remanding this Galperin Case by the United States Supreme Court.

²² Rie v. Galperin Appellate brief, p 4-5.

thus Petitioner should pay the attorney fee to another attorney again in the underlying case, BC275364.

Petitioner was clearly not aware of the complex nature of the cases and his actions, which a warning would have remedied. Because no such warning was given, Petitioner proceeded in a manner detrimental to the case.

**F. CALIFORNIA CIVIL CODE § 2966 SHOULD BE
INTERPRETED TO REQUIRE ACTUAL RECEIPT BY A
TRUSTOR OF NOTICE OF BALLOON PAYMENT AND THE
CURRENT INTERPRETATION VIOLATES 14th
AMENDMENT RIGHT TO DUE PROCESS.**

California Civil Code § 2966 requires holders of notes with balloon payments to provide written notice by certified mail of when the payment is due within a specific time frame. The Appellate Court found that this section should not be interpreted to require actual receipt of notice. However, there was no case law to support such a finding. Instead, the court relied on case law applicable only to Civil Code §§ 2924-2924(h). Additionally, the Appellate Court held that the notice of balloon payment pursuant to California Civil Code § 2966 was prepared and written in January of 1999 when in fact it was prepared in April of 1999 together with the cover letter of April 14, 1999.

By not requiring actual receipt, the court ignores the legislative intent behind § 2966. In requiring the additional step of certified mail, the statute serves to protect borrowers. Further, to not require proof of receipt renders the additional requirement of notice to be sent by certified mail useless. As Petitioner states in his appeal, "Not requiring actual receipt of notice can cause ... dangerous situations in the real world by dishonest and fraudulent people. For example, the whole process of foreclosure caused by balloon payment issue can be consummated even without a single certificate. It can be and will be abused with fraud and/or with conspiracy by unconscionable people. Further, this fraud or conspiracy will be encouraged for those trustees who have smaller amount of loan or smaller ratio of debt/property." Simply requiring that proof of receipt be necessary to validate the service

under § 2966, supports the Legislative intent to protect borrowers by requiring that the notice be made by certified mail with a receipt rather than by regular mail. By not requiring actual receipt, the Court misconstrues the intent of the legislature and violates Petitioners constitutional, 14th Amendment right to Due Process.

G. THE AMBIGUOUS EXPRESSION IN THE COMPLAINT OF RIE V. 6 ANGELS CANNOT BE A REAL JUDICIAL ADMISSION THAT RIE RECEIVED THE NOTICE IN JANUARY of 1999.

Petitioner's signature on the verification page of the complaint of other case of Rie vs. 6 Angels was alleged as a judicial admission. But the expression is logically ambiguous and Petitioner, who is a layman without such legal experiences and whose major was economics but not law and whose native language is not English, perceives it is not inconsistent with the fact that he received the Section 2966 Notice in April of 1999 with the cover letter.²³ Further, Petitioner relied on Attorney Galperin as a professional attorney with experience. Petitioner did not, consequently, question the content of the Complaint too extensively nor did Petitioner have sufficient time to review the Complaint. Petitioner, as a layman, was not aware that signing the verification page of the Complaint would amount to a simple judicial admission. Unfortunately, all physical evidence indicating the Petitioner's misunderstanding was not admitted as evidence by the court.

Petitioner, acting in pro per, stated in his complaint, "Although the Notice Pursuant to Civil Code 2966 was required at the time the note became due in 1993, it was not until January 7, 1999 that Defendant Tursugian served the required Notice ..." This statement was one part of a multi-faceted complaint, addressing

²³ Rie v. Rosen, Appellate Brief p. 7. Whether Petitioner received the Notice (the same of Exhibit H) in January 7, 1999 or April 14, 1999 is a hot issue also in Rie vs. Galperin Case (BC290904), which is also petitioned to the United States Supreme Court.

several issues that Petitioner, as a layman, could not have understood. Petitioner saw the above statement not as an affidavit but rather a part of a whole document, the complaint. Without words such as, "admission" or "admit" on the verification page of the complaint, the Petitioner could not have known that he was making an admission. However, even if viewed as a single statement, the Petitioner cannot see how the above quoted statement could be interpreted to mean that Petitioner was served the required Notice by the Tursugians on January 7, 1999.

As a layman, without legal training whose native language is not English, the Petitioner had a very different perception of the above statement. Petitioner can comprehend how a legal perception of such a statement can differ. However, to punish Petitioner as an in pro per litigant without providing the proper warning is to deny Petitioner of his 14th Amendment right to a fair trial and due process under the law.

H. THE APPLICATION OF THE ALLEGED JUDICIAL ADMISSION MADE IN A SEPARATE CASE SHOULD NOT APPLY TO THE RIE V. ROSEN CASE THROUGH AN EXHIBIT OF RIE V. GALPERIN CASE, AND SUCH AN APPLICATION VIOLATES THE PETITIONER'S 14TH AMENDMENT RIGHT TO DUE PROCESS.

By applying the alleged judicial admission in the complaint of a separate case (Rie v. 6 Angels, BC223268) through abusing Exhibit H of this case, the Court denied the Petitioner's right to due process. The courts have recognized that while a judicial admission is considered to be conclusive on the party by whom it was made, a party to an action is ordinarily not foreclosed by such an admission made in another course of action.²⁴ Here, the court applied the alleged judicial admission in the Rie v. 6 Angles case to the Rie v. Rosen case through abusing Exhibit H of Rie v. Galperin case. As a result, Petitioner was not able to raise critical issues for the Rie v. Rosen case.

²⁴ See e.g., Jones v. Piper Aircraft Corp., 18 F.R.D. 181, 183 (M.D. Pa. 1955).

I. THE APPLICATION OF SIROTT AND BUDD TO THE PETITIONER'S CASE FURTHER VIOLATES THE PETITIONER'S 14TH AMENDMENT RIGHT TO DUE PROCESS.

The court referred to *Sirlott v Latts* and *Budd v. Nixon*²⁵ in stating:

Although the fees at issue in *Sirott and Budd* were owed to new counsel seeking to correct or mitigate the original attorney's error, we see no reason the same rule should not apply when fees are incurred by the original attorney. When the demurrer to the *Rie v. 6 Angels* action was opposed by Galperin, the Ries sustained actual injury that was neither speculative nor contingent, and had or should have had knowledge of the alleged wrongdoing.²⁶

This application of the above case to the Petitioner's case is in error. Unlike the *Sirlott* case, Petitioner sought another attorney for another reason, breach of agreement by Rosen, not to correct Galperin's error regarding the alleged judicial admission. This is clearly stated in the FAC. The judicial interpretation of the statement made in the complaint as a judicial admission may have been clear in the eyes of an attorney and judge. However, to a layman like to Petitioner, it was simply a statement of fact. The fact that Petitioner was unaware of the possible impact that his signature on the verification page could have, made the potential damage to the Petitioner both speculative and contingent.

X. CONCLUSION AND RELIEF SOUGHT

For the forgoing reasons, Petitioner respectfully requests this case be remanded to Trial Court to apply the proper standard of review of a reasonable lay-person under California Civil Procedure § 473, and excuse Petitioner's errors due to lack of legal training. Further, Petitioner requests that the Trial Court find that California Civil Code § 2966 require actual receipt of notice, and not apply the alleged judicial admission of the *Rie v. 6*

²⁵ *Sirott v. Latts* (1992) 6 Cal.App.4th 923; *Budd v. Nixon* (1971) 6 Cal.3d 195, 98 Cal. Rptr. 849.

²⁶ P. 12 of Opinion.

Angels case to Rie v. Rosen case through abusing Exhibit H of
Rie v. Galperin case while ignoring Rie's Document.

Respectfully submitted this 31st day of October 2005,

A handwritten signature in black ink, appearing to read "Jin Rie".

Jin Rie, Petitioner in Pro Per

APPENDIX 1 STATUTORY PROVISIONS

California Code of Civil Procedure § 473: Amendment of pleadings

(a) (1) The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

(2) When it appears to the satisfaction of the court that the amendment renders it necessary, the court may postpone the trial, and may, when the postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of any costs as may be just.

(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client,

and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

(c) (1) Whenever the court grants relief from a default, default judgment, or dismissal based on any of the provisions of this section, the court may do any of the following:

- (A) Impose a penalty of no greater than one thousand dollars (\$ 1,000) upon an offending attorney or party.
- (B) Direct that an offending attorney pay an amount no greater than one thousand dollars (\$ 1,000) to the State Bar Client Security Fund.
- (C) Grant other relief as is appropriate.

(2) However, where the court grants relief from a default or default judgment pursuant to this section based upon the affidavit of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief shall not be made conditional upon the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or upon compliance with other sanctions ordered by the court.

(d) The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.

IV Witkin Cal. Crim. Law Crim Trial § 256: Admonitions to Defendant
In order competently and intelligently to choose self-representation, "defendant should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " (*Faretta v. California* (1975) 422 U.S. 806, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 582, *suprn*, §248.)

In *People v. Lopez* (1977) 71 C.A.3d 568, 138 C.R. 36, the court suggested specific guidelines for trial judges to consider when a defendant asserts the right of self-representation:

(a) The defendant must be made aware of the dangers and disadvantages of self-representation. The admonition should include the following: (1) Self-

representation is almost always unwise and defendant may conduct a defense to his or her own detriment; (2) defendant will have to abide by the same rules as lawyers and will get no help from the judge; (3) the prosecution will be represented by experienced professional counsel who will have the advantage of skill, training, and ability; and (4) defendant will have no special library privileges nor a staff of investigators at defendant's beck and call. (71 C.A.3d 573.)

(b) The trial court should make some inquiry into defendant's intellectual capacity. The range of this inquiry might include the following: (1) The court might examine the defendant's education and familiarity with legal procedures. (2) If there is any question about defendant's mental capacity, the trial court should consider referral for a psychiatric exam. (3) To determine that defendant's choice is an intelligent one, defendant must be fully aware of his or her right to counsel at no cost. (4) The trial judge should consider exploring the nature of the proceedings, and the possible outcome and punishment. (5) Defendant should know that the right of self-representation may be terminated for misbehavior or trial disruption. (71 C.A.3d 573, 574.)

(c) The defendant waives any claim that self-representation was inadequate or that defendant was denied the effective assistance of counsel. Thus, defendant should know that he or she "will be throwing away one of the criminal defendant's favorite contentions on appeal." (71 C.A.3d 574.)

However, the test of a valid waiver of counsel "is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (People v. Bloom (1989) 48 C.3d 1194, 1225, 259 C.R. 669, 774 P.2d 698; see People v. Cervantes (1978) 87 C.A.3d 281, 287, 150 C.R. 819 [warning not adequate; record did not demonstrate knowing and intelligent election]; People v. Fabricant (1979) 91 C.A.3d 706, 713, 154 C.R. 340 [record did not reveal adequate warnings]; People v. Torres (1979) 96 C.A.3d 14, 22, 157 C.R. 560 [serious and complex offense required admonition of perils of self-representation; admonition could be memorialized at any place in the record]; People v. Burdine (1979) 99 C.A.3d 442, 447, 160 C.R. 375 [form petition to proceed in pro. per. sufficient to show knowing and intelligent election]; People v. Barlow (1980) 103 C.A.3d 351, 364, 163 C.R. 664 [criticizing Fabricant; Fareta does not require any particular warning]; People v. Paradise (1980) 108 C.A.3d 364, 366, 166 C.R. 484 [refusing to follow Torres; warning of risk of self-representation "need not appear of record so long as the record as a whole shows that the express waiver of counsel was intelligent and with understanding"]; Benge v. Superior Court (1980) 110 C.A.3d 121, 129, 167 C.R. 714 [record need not show advice to defendant,

only knowing and intelligent election]; *Zimmerman v. Municipal Court* (1980) 111 C.A.3d 174, 179, 168 C.R. 434 [Lopez does not require specific warning and record need not affirmatively show that defendant was advised of risks of self-representation]; *People v. Longwith* (1981) 125 C.A.3d 400, 407, 409, 178 C.R. 136 [Lopez criteria and standards not binding]; *People v. Spencer* (1984) 153 C.A.3d 931, 944, 945, 200 C.R. 693 [warning required when defendant personally presents case with attorney as cocounsel]; *People v. Mellor* (1984) 161 C.A.3d 32, 207 C.R. 383 [relevant question is whether trial judge made inquiry adequate to insure knowing and intelligent inquiry; Lopez criteria not binding]; *People v. Truman* (1992) 6 C.A.4th 1816, 1823, 9 C.R.2d 138 [claim that certain warnings were not given was insufficient to show that waiver was not knowing and intelligent]; *People v. Noriega* (1997) 59 C.A.4th 311, 315, 69 C.R.2d 127 [merely asking defendant if he knew of constitutional right to counsel and voluntarily waived it was inadequate].)

A warning that a self-represented defendant is precluded from asserting ineffective assistance of counsel as grounds for relief on appeal is not constitutionally required. (*People v. Bloom* (1989) 48 C.3d 1194, 1225, 259 C.R. 669, 774 P.2d 698.)

Title 28 U.S.C. § 1915 (2005) Proceedings in forma pauperis

(a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such [person] prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month

period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds \$ 10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate [United States magistrate judge] in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title [28 USCS § 636(b)] or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title [28 USCS § 636(c)]. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e) (1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or
(B) the action or appeal--
(i) is frivolous or malicious;
(ii) fails to state a claim on which relief may be granted; or
(iii) seeks monetary relief against a defendant who is immune from such relief.

(f) (1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2) (A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

28 U.S.C.S. § 2255: Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or

infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain--

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

California Rules of Court §1800: Definition

(a). [Definition]

A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.

(b). [Factors]

In deciding whether an action is a complex case under subdivision (a), the court shall consider, among other things, whether the action is likely to involve:

- (1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
- (2) Management of a large number of witnesses or a substantial amount of documentary evidence;
- (3) Management of a large number of separately represented parties;
- (4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
- (5) Substantial postjudgment judicial supervision.

(c). [Provisional designation]

Except as provided in subdivision (d), an action is provisionally a complex case if it involves one or more of the following types of claims:

- (1) Antitrust or trade regulation claims;
- (2) Construction defect claims involving many parties or structures;
- (3) Securities claims or investment losses involving many parties;
- (4) Environmental or toxic tort claims involving many parties;
- (5) Claims involving mass torts;
- (6) Claims involving class actions; or
- (7) Insurance coverage claims arising out of any of the claims listed in subdivisions (c)(1) through (c)(6).

(d). [Court's discretion]

Notwithstanding subdivision (c), an action is not provisionally complex if the court has significant experience in resolving like claims involving similar facts.

and the management of those claims has become routine. A court may declare by local rule that certain types of cases are or are not provisionally complex pursuant to this subdivision.

California Government Code section 68607: Responsibilities and duties of judges

In accordance with this article and consistent with statute, judges shall have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action.

The judges of the program shall, consistent with the policies of this article:

- (a) Actively monitor, supervise and control the movement of all cases assigned to the program from the time of filing of the first document invoking court jurisdiction through final disposition.
- (b) Seek to meet the standards for timely disposition adopted pursuant to Section 68603.
- (c) Establish procedures for early identification of cases within the program which may be protracted and for giving those cases special administrative and judicial attention as appropriate, including special assignment.
- (d) Establish procedures for early identification and timely and appropriate handling of cases within the program which may be amenable to settlement or other alternative disposition techniques.
- (e) Adopt a trial setting policy which, to the maximum extent possible, schedules a trial date within the time standards adopted pursuant to Section 68603 and which schedules a sufficient number of cases to ensure efficient use of judicial time while minimizing resetting caused by overscheduling.
- (f) Commence trials on the date scheduled.
- (g) Adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of the litigation.

California Civil Code § 2966. Transaction including balloon payment note; Notice required; Failure to comply

(a) In a transaction regulated by this article, which includes a balloon payment note when the term for repayment is for a period in excess of one year, the holder of the note shall, not less than 90 nor more than 150 days before the balloon payment is due, deliver or mail by first-class mail, with a certificate of mailing obtained from the United States Postal Service, to the trustor, or his or her successor in interest, at the last known address of such person a written notice, to include:

(1) A statement of the name and address of the person to whom the balloon payment is required to be paid.

(2) The date on or before which the balloon payment was or is required to be paid.

(3) The amount of the balloon payment, or if its exact amount is unknown a good faith estimate of the amount thereof, including unpaid principal, interest, and any other charges (assuming payment in full of all scheduled installments coming due between the date of the notice and the date when the balloon payment is due).

(4) A description of the trustor's right, if any, to refinance the balloon payment, including a summary of the actual terms of the refinancing or an estimate or approximation thereof, to the extent known.

If the due date of the balloon payment of a note subject to this subdivision is extended prior to the time notice is otherwise required under this subdivision, this notice requirement shall apply only to the due date as extended (or as subsequently extended).

(b) Failure to provide notice as required by subdivision (a) does not extinguish any obligation of payment by the trustor, except that the due date for any balloon payment shall be the date specified in the note, or 90 days from the date the delivery or mailing of the notice, or the date specified in the notice, whichever date is later. If the operation of this section acts to extend the term of any such note, interest shall continue to accrue for the extended term at the contract rate and payments shall continue to be due at any periodic interval and on any scheduled payment schedule specified in the note and shall be credited to principal or interest under terms of the note. Default in any extended periodic payment shall be considered a default under terms of the note or security instrument.

(c) Any failure to comply with the provisions of this section shall not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value and without notice.

(d) Every note subject to the provisions of this section shall include the following statement:

"This note is subject to Section 2966 of the Civil Code, which provides that the holder of this note shall give written notice to the trustor, or his successor in interest, of prescribed information at least 90 and not more than 150 days before any balloon payment is due."

Failure to include this notice shall not invalidate the note.

(e) The provisions of this section shall apply to any note executed on or after July 1, 1983.

APPENDIX 2

DECISION OF THE CALIFORNIA SUPREME COURT
Jin Rie, Plaintiff and Appellant v. Ron S. Galperin, Defendant
and Respondent
Case No.: S131619

Court of Appeal, Second Appellate District, Division Four - No. B172448
S131643

IN THE SUPREME COURT OF CALIFORNIA

Ea Banc

JIN RIE et al., Plaintiffs and Appellants,

v.

RON S. GALPERIN et al., Defendants and Respondents.

Petition for review DENIED.

SUPREME COURT
FILED

MAR 30 2005

Frederick K. Ohlrich Clerk

DEPUTY

GEORGE

Chief Justice

APPENDIX 3

OPINION OF THE COURT OF APPEAL THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

**Jin Rie, Plaintiff and Appellant v. Ron S. Galperin, Defendant
and Respondent**
Case No.: B172448

**JIN RIE et al., Plaintiffs and
Appellants, v. RON S. GALPERIN et
al., Defendants and Respondents.**

B172448

**COURT OF APPEAL OF
CALIFORNIA, SECOND
APPELLATE DISTRICT, DIVISION
FOUR**

2005 Cal. App. Unpub. LEXIS 220

January 10, 2005, Filed

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC290904. James Chalfant, Judge.

DISPOSITION: Affirmed.

CORE TERMS: notice, demurrer, balloon, actual injury, lawsuit, verified, statute of limitations, omission, insurers, cause of action, wrongful act, malpractice, legal malpractice, foreclosure, speculative, settlement, contingent, mailing, date specified, sustaining, mailed, accrue, limitations period, demurred, trustor, ceased, mail, causes of action, law firm, tolled

COUNSEL: Jin Rie, in pro. per., and for Plaintiffs and Appellants.

Law Office of Lori Wade and Lori Wade for Defendants and Respondents.

JUDGES: CURRY, J.; EPSTEIN, P. J., HASTINGS, J. Concurred.

OPINIONBY: CURRY

OPINION:

FACTUAL AND PROCEDURAL BACKGROUND

This case is related to the appeal in Rie v. Rosen, case number B169669, in the sense that appellant Jin Rie blames respondent Ron S. Galperin and his law firm, the Law Offices of Ron S. Galperin (jointly referred to herein as Galperin) for the loss of certain claims against defendants in that action. As we explained in the related appeal, in 1992, Rie and his wife Cheon Rie purchased property from Asadur and Petra Tursugian who held back a second deed of trust. In 1999, the Tursugians foreclosed on the deed of trust. The property was purchased at the foreclosure sale by 6 Angels, Inc.

In June 2002, the Ries filed a lawsuit against the Tursugians; their attorney Alan Rosen; his law firm, the Law Offices of Rosen and Loeb; and the company that had handled the foreclosure, SBS Trust Deed Network (SBS). That complaint, Rie v. Rosen, case no. 275364, is the subject of appeal no. B169669.

Prior to the filing of that complaint, Galperin had initiated on behalf of Rie another action against the Tursugians, SBS, and 6 Angels, claiming that they had engaged in misrepresentation and breach of contract in connection with the foreclosure and seeking an accounting and declaratory relief, Rie v. 6 Angels, case number BC223268. That action, initiated by a verified complaint, was apparently filed in January 2000. The verified complaint contained an allegation stating: "Although the Notice Pursuant to *Civil Code* 2966[n1] was required at the time the note became due in 1993, it was not until January 7, 1999 that Defendant Tursugian served the required Notice." In addition, attached as exhibit H to the complaint was a copy of a "Notice Pursuant to *Civil Code Section 2966* "dated January 7, 1999, signed by Rosen on behalf of the Tursugians. The document stated that the balance due on the note should be paid on April 15, 1999.

¹¹ The final payment under the Tursugian note was to be a balloon payment. *Civil Code section 2966* (section 2966) requires holders of notes containing balloon payment provisions to "deliver or mail by first-class mail, with a certificate of mailing obtained from the United States Postal Service, to the trustor, or his or her successor in interest, at the last known address of such person a written notice" that includes "the date on or before which the balloon payment was or is required to be paid." This notice is to be sent "not less than 90 nor more than 150 days before the balloon payment is due[.]" (§ 2966, subd. (a).) Failure to provide notice within that time frame "does not extinguish any obligation of payment by the trustor[.]" (§ 2966, subd. (b).) But "the due date for any balloon payment shall be the date specified in the note, or 90 days from the date of the delivery or mailing of the notice, or the date specified in the notice, whichever date is later."¹² (*Ibid.*)

Galperin ceased representing Rie in June 2000, apparently due to a dispute over whether Rosen and his law firm should be added as defendants. Prior to Galperin ceasing the representation, 6 Angels surrendered title to the property to the Ries and was dismissed from the case, and the Tursugians demurred to the complaint. One basis for the demurrer was that they had "strictly complied" with section 2966 in that their attorney Rosen sent the Ries the required section 2966 notice on January 7, 1999, citing to Exhibit H attached to the Ries' complaint. The opposition to the demurrer prepared by Galperin stated: "There is no evidence that [the Tursugians] complied with *Civil Code Section 2966(a)*, which requires that the Notice be 'delivered or mailed by first-class mail, with a certificate of mailing obtained from the United States Postal Service'" and that "the Notice pursuant to *Civil Code Section 2966* is unclear as to the amount due, the interest accrued and the dates." The demurrer was overruled. In late 2000 or early 2001, for reasons that are not set forth in the record, the Rie v. 6 Angels action was dismissed.

The Rie v. Rosen lawsuit filed in June 2002 alleged, among other things, that the Tursugians and Rosen "claimed to have given notice . . . in January 1999 of a balloon payment"; that the Ries "had not received such notice from any of the defendants concerning any such balloon payment due date"; and that the

Tursugians "attempted to back-date notices of balloon payments in order to demonstrate compliance with the 90 day advance notice requirements . . . of section 2966." It was the subject of several demurrers. In ruling on two of the demurrers in February and July 2003, the trial court in that action sustained without leave to amend as to causes of action for wrongful foreclosure and misrepresentation based in part on the above-quoted statement from the verified complaint in Rie v. 6 Angels that the required section 2966 notice was served on January 7, 1999. In its orders, the court specifically stated: "In ruling on Defendants' prior demurrer, the court took judicial notice of [the Ries'] verified complaint that was filed in [Rie v. 6 Angels,] case BC223268, and the allegations in P20 of that complaint that [the] Tursugians had served notice of the balloon payment on 1/7/99. The court found that this allegation amounted to an admission by [the Ries] that they had received the requisite notice as of 1/7/99." This meant, among other things, that "[the Ries] knew, or reasonably should have known, as of that date that the defendants' representations regarding the alleged payment arrangement were false and that the defendants did not intend to honor it." Further, it eliminated the most important basis for the wrongful foreclosure action: that the Tursugians failed to give notice required by section 2966 prior to foreclosing.

On or about February 25, 2003, after the first of these adverse rulings, Rie filed a complaint for legal malpractice against Galperin. That complaint is not in our record. The first amended complaint (FAC), filed after demurrer was sustained, alleged causes of action for legal malpractice, intentional deceit, negligent misrepresentation, and breach of agreement. The claims were based in large part on the statement in the verified complaint in the Rie v. 6 Angels lawsuit concerning the section 2966 notice. Rie contended that the statement was false, that he did not understand the significance of it at the time, and that he was pressed by Galperin to sign the verified complaint without having sufficient time to thoroughly review it. The FAC alleged that the significance of the statement did not become apparent until

January 2003, when it was first quoted by the defendants in the Rie v. Rosen lawsuit, and swayed the trial court to sustain the demurrer to two causes of action.

Galperin demurred based on failure to state a viable claim and expiration of the statute of limitations. The demurrer was sustained without leave to amend. Judgment was entered in favor of Galperin. This appeal followed.

DISCUSSION

We begin by making clear that we agree with Galperin that many of the allegations in Rie's malpractice complaint do not support a claim of any kind. Attempting to base a claim on Galperin's failure to include Rosen, the Tursugians' attorney, in the lawsuit leads nowhere. Rie knew that Galperin was of the opinion Rosen should not be named, and indeed alleges that the failure to name Rosen was the basis for their parting of the ways in June 2000. For good or ill, Rie and his new attorney added Rosen as a defendant in the lawsuit filed in June 2002. The failure to include Rosen in the earlier action did not, in and of itself, lead to any injury.

The contention that Galperin failed to "pay . . . attention to [Ries's] opinion, expressions . . . written preparations, etc." is equally meaningless. An attorney's duty is to represent the client's best interests. That does not necessarily include heeding the client's every suggestion or opinion.

The only specific allegation that supports a malpractice/breach of contract cause of action is the allegation that Galperin included a statement in the verified complaint in the Rie v. 6 Angels action that was not true concerning the service of the section 2966 notice on January 7, 1999. Including a factual statement in a pleading without grounds for believing it to be true could potentially lead to liability if the statement leads to a cause of action or complaint being wrongly dismissed.

Since the alleged wrongful conduct occurred in January 2000, Galperin ceased representation of Rie in June 2000, and the

malpractice complaint was not filed until February 2003, the primary issue is whether the statute of limitations bars the claim.

I

Section 340.6 of the Code of Civil Procedure (section 340.6), the special statute of limitations for attorney malpractice actions, provides in pertinent part: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful action or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [P] (1) The plaintiff has not sustained actual injury; [P] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; [P] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and [P] (4) The plaintiff is under a legal or physical disability which restricts the plaintiffs' ability to commence legal action."

In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739 (*Jordache*), the Supreme Court explained that knowledge alone does not cause the statute of limitations to accrue in the absence of actual injury. The court cited the case of *Budd v. Nixen* (1971) 6 Cal.3d 195, 98 Cal. Rptr. 849, for the following proposition: "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. [Citation.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm--not yet realized--does not suffice to create a cause of action for negligence. [Citations.] Hence, until the client suffers appreciable harm as a consequence of [the] attorney's negligence, the client

cannot establish a cause of action for malpractice." (18 Cal.4th at pp. 749-750.) This led the court in *Jordache* to hold: "The 'actual-injury' provision in section 340.6, subdivision (a)(1), effectively continued the accrual rule *Budd* established. Under *Budd*, the cause of action could not accrue until the plaintiff suffered actual loss or damage resulting from the allegedly negligent conduct. [Citation.] After sustaining damages compensable in a negligence action, the plaintiff could establish a cause of action for professional negligence, and the limitations period commenced. [Citation.] Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury." (*Id.* at p. 751, italics added.)

Galperin argues here, and similarly argued in connection with the demurrer to the FAC, that "the statute of limitations [for attorney malpractice] begins to run when the wrongful act or omission is discovered or should have been discovered," and that "the statute of limitations has run as to the 'ambiguous expression' because Rie with diligence should have discovered said expression." That is an incorrect statement of the law. As *Jordache* clearly holds, discovery is irrelevant where damages have not been sustained.

Alternatively, Galperin contends that the statement had "nothing to do" with the trial court's rulings sustaining the demurrers in the Rie v. Rosen litigation. The order sustaining the demurrer to the wrongful foreclosure cause of action stated in part: "Plaintiffs [Rie and his wife Cheon Rie] contend that the allegation only means that notice was not given in 1993 and argue that P 20 cannot be understood as an admission that a certified mailing of the notice occurred. [The Ries'] argument is not well taken; P 20 explicitly alleges that the notice of balloon payment was served on January 7, 1999 and nowhere in the verified complaint is there an allegation that [the Ries] did not receive that notice. [P] In any event [the Ries'] allegations that they never received the notice are irrelevant because [the Ries] were

nevertheless required to make the balloon payment by 4/15/99. *Civil Code § 2966(b)* provides any failure to provide notice of a due balloon payment as required by that section does not extinguish a trustor's obligation to make payments on a note, 'except that the due date for any balloon payment shall be the date specified in the note, or 90 days from the date [of] the delivery or mailing of the notice, or the date specified in the notice, whichever date is later.' Defendant Tursugian served notice of the due balloon payment on 1/7/99. [The Ries] were thus required to make the balloon payment on 4/15/99, since it was a later date than the date 90 days after the notice was *mailed*. Having failed to make that payment, [the Ries'] claim of wrongful foreclosure is without merit." (Italics added.)

The quoted order established that the trial court in sustaining the demurrers in the Rie v. Rosen lawsuit saw two potential interpretations of the statement in the verified complaint in the Rie v. 6 Angels lawsuit: it could be interpreted as establishing the Ries *received* the notice on January 7, 1999, or it could be interpreted as establishing the notice was *mailed* on January 7, 1999. In either case, the trial court was of the view that demurrer to the wrongful foreclosure claim should be sustained. But the fact remains that the court's only basis for believing the notice was received or mailed on January 7, 1999, and thereby sustaining the demurrer to the wrongful foreclosure claim in the Rie v. Rosen lawsuit was judicial notice of the statement in the earlier lawsuit. If that statement was false, as was contended in the complaints filed in the Rie v. Rosen lawsuit and in the underlying malpractice lawsuit, it was the immediate cause of the loss of the claim.

II

Although the trial court may have erroneously sustained the demurrer based on an incorrect belief that accrual of the statute of limitations under section 340.6 occurred at the time of discovery without regard to actual injury, we believe the judgment can be affirmed on an alternate ground: the undisputable facts establish

that the Ries suffered actual injury in 2000 as defined by the Supreme Court in *Jordache* when they incurred attorney fees to oppose the Tursugians' demurrer to the verified complaint in the Rie v. 6 Angels litigation.

In *Jordache, supra*, 18 Cal.4th 739, the client (Jordache) learned of a potential mistake made by its former attorneys (Brobeck) in December 1987 when new counsel explained that Jordache should have presented a claim to its insurers in 1984 after being sued for allegedly marketing counterfeit Guess? jeans. New counsel tendered defense of the action to Jordache's insurers in 1987. One of the defenses raised by the insurers was untimely notice and substantial prejudice. The legal malpractice action against Brobeck was not filed until several years later, after Jordache settled the original action and received a partial reimbursement from a separate settlement with its insurers. At the time of the latter settlement, a ruling had been issued by the trial court stating that whether one of the insurers had been substantially prejudiced by the late notice was an issue of fact that could not be determined on summary judgment, so it seemed likely that the lateness of the claim impaired the value of the settlement with the insurers.

In the legal malpractice action, Jordache argued that the statute of limitations in section 340.6 did not accrue until the insurers settled for a lesser amount than might have been obtained had the suit been brought in 1984. The Brobeck firm contended that that statute accrued in 1987, because by that time, Jordache had knowledge of the alleged mistake and had incurred actual injury in the form of monies used for defense costs in the underlying action that might otherwise have been paid by the insurers. The trial court agreed with Brobeck and entered judgment. The Court of Appeal sided with Jordache, and reversed.

The Supreme Court granted a petition for review to answer the following legal question: "When does a former client--having discovered the facts of its attorneys' malpractice--sustain actual injury so as to require commencement of an action against the

attorneys within one year?" (*18 Cal.4th* at p. 747.) The court rejected the Court of Appeal's suggestion that actual injury does not occur until related litigation concludes. "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor. [Citations.] [P] . . . The inquiry concerns whether 'events have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages.' [Citation.] However once the plaintiff suffers actual harm, neither difficulty in proving damages nor uncertainty as to their amount tolls the limitations period. [Citation.]" (*Id. at p. 752*, quoting *Davies v. Krasna* (1975) *14 Cal.3d* 502, 513, *121 Cal. Rptr.* 705.)

Instead, the court held, "the test of actual injury under 340.6" turns on the issue of "whether the plaintiff has sustained any damages compensable in an action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services." (*Jordache, supra*, *18 Cal.4th* at p. 751.) The court was clear that "the determination of when attorney error has caused actual injury under section 340.6, subdivision (a)(1), cannot depend on facile, 'bright line' rules. [Citation.] Instead, the particular facts of each case must be examined in light of the wrongful act or omission the plaintiff alleges against the attorney. When the alleged error causes injury or harm recoverable in a legal malpractice action, the plaintiff has 'sustained actual injury' that ends tolling under section 340.6, subdivision (a)(1)." (*Id. at p. 764*.)

In so holding, the court expressly overruled its prior decision in *ITT Small Business Finance Corp. v. Niles* (1994) *9 Cal.4th* 245, wherein the court had indicated that the statute of limitations for legal malpractice did not accrue until "entry of adverse

judgment, settlement, or dismissal of the underlying action." (*Id.* at p. 258.)

The court further held in *Jordache*, that generally the facts and circumstances of each case must be analyzed by the trier of fact to determine when the plaintiff sustained actual injury. (*Jordache, supra, 18 Cal.4th at p. 764.*) However, "when the material facts are undisputed, the trial court can resolve the question as a matter of law" (*Ibid.*) In *Jordache*, the undisputed facts established that Jordache's injuries were not speculative or contingent: "Speculative and contingent injuries are those that do not yet exist, as when an attorney's error creates only a potential for harm in the future. [Citation.] An existing injury is not contingent or speculative simply because future events may affect its permanency or the amount of monetary damages eventually incurred. [Citations.]" (*Id. at p. 754.*) Distinguishing between "an actual, existing injury that might be *remedied or reduced* in the future, and a speculative or contingent injury that might or might not *arise* in the future," the court concluded that Jordache sustained actual injury no later than 1987 because by then it "had expended millions of dollars to defend the [original] action and lost millions of dollars from profitable investments forgone to pay defense costs." (*Ibid.*) "These actual, existing injuries, and the diminution of Jordache's insurance policy rights the late tender occasioned, did not first arise when the coverage litigation was settled." (*Ibid.*)

Turning to the facts of the present case, it is undisputable that during the pendency of the *Rie v. 6 Angels* litigation, the Tursugians demurred to the Ries' complaint based on the section 2966 notice having been served on January 7, 1999, as alleged in the verified complaint in that action. Galperin opposed the demurrer on the Ries' behalf, causing the Ries to incur attorney fees. Cases hold that "[a] client suffers damage when he is compelled, as a result of the attorney's error, to incur or pay attorney fees." (*Sirott v. Latts* (1992) 6 Cal.App.4th 923, 928; accord, *Budd v. Nixon, supra, 6 Cal.3d 195, 201-202.*) Although the fees at issue in *Sirott* and *Budd* were owed to new counsel

seeking to correct or mitigate the original attorney's error, we see no reason the same rule should not apply when fees are incurred by the original attorney. When the demurrer to the Rie v. 6 Angels action was opposed by Galperin, the Ries sustained actual injury that was neither speculative nor contingent, and had or should have had knowledge of the alleged wrongdoing. The Ries could have brought a legal malpractice action against Galperin at that point. However, pursuant to section 340.6, subdivision (2), the statute of limitations was tolled until Galperin ceased representing the Ries in June 2000, so the action could have been filed within a year of that time. It was not filed until 2003. The trial court correctly ruled that the statute of limitations had expired.

DISPOSITION

The judgment is affirmed. Each party is to bear its own costs.

CURRY, J.

We concur:

EPSTEIN, P. J.

HASTINGS, J.